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CONSTITUTIONALITY OF TEACHERS' PENSIONS LEGISLATION.

I. PENSION LAWS IN GENERAL.

TO arrive at a safe conclusion as to the validity of legislation providing for teachers' pensions requires some consideration of all pension legislation.

A pension is defined by BOUVIER as "A stated and certain allowance granted by the government to an individual, or those who represent him, for valuable services performed by him for the country;"¹ "a periodical allowance of money granted by the government for services rendered;"² "a stated payment to a person in consideration of the past services of himself or of some kinsman or ancestor;"³ "an annuity from the government for services rendered in the past;"⁴ "a bounty for past services rendered to the public;"⁵ "a mere bounty or gratuity given in consideration or recognition of meritorious past services rendered by the pensioner or by some kinsman or ancestor;"⁶ it "is in the nature of a gift for the personal benefit" of the beneficiary;⁷ pensions, "are not granted *in consequence* of a deficiency of pay while in service, but they are gratuities for honorable service when the party in most cases is unable to render further services;" yet they are usually considered as being granted

Note.—This and part II (to appear later) were prepared at the request of the Michigan State Teachers' Federation in reference to a bill pending in the Legislature of Michigan to provide retirement salaries for teachers. The provisions of the bill are discussed in detail in part II.

¹ Bouvier, Law Dictionary, Vol. II, 2d Ed., Article "Pensions."

² 30 Cyc., p. 1368, "Pensions."

³ 22 Am. & Eng. Encyc., 2d Ed., 658, "Pensions and Bounties."

⁴ Aetna Ins. Co. v. Jones (1907) 78 S. C. 445, 59 S. E. 148, 152.

⁵ Price v. Savings Soc. (1894) 64 Conn. 362, 366, 42 Am. St. R. 198, 30 Atl. 139.

⁶ Manning v. Spry (1903) 121 Ia. 191, 194, 96 N. W. 873.

⁷ People v. Williams (1893) 27 N. Y. S. 23, 25, 6 Misc'l Rep. 185.

partly because the service rendered was of much greater value than the sum paid at the time, and also as a gratuity, because not founded on any enforceable contract.⁸ They include "any half pay, compensation, allowance, superannuation or retirement allowance, or other payment of the like nature, made on the retirement of any officer;"⁹ a pension differs from a salary in that the pensioner is not under any obligation to render any service for his pension; but both pensions and salaries are property.¹⁰ In the foregoing, "pensions", are defined as grants of *governments*; however the term has also often been applied to gratuitous annuities granted by corporations.¹¹

While pensions for military service have generally been regarded with favor, those for civil service have not always been so. This perhaps is due in large measure to the abuse of power to grant pensions by the English kings, whereby they secured control of Parliamentary legislation. In 1707, crown pensioners were disqualified from holding seats in Parliament,¹² and under GEORGE III, a large part of the revenue appropriated to the civil service was secretly paid out by him in pensioning his supporters. In 1769 BURKE proposed that pensions be conferred "only to reward merit," and in 1782 his scheme was adopted, and pensions were to be paid only out of the Exchequer, "for persons in distress or as a reward of merit", and in 1834 the pension list was separated from the civil list, and was to apply only to persons for "personal services to the crown, performance of duties to the public, or by useful discoveries in science and attainments in literature and art."¹³ It now includes pensions for political, judicial, diplomatic, colonial, military, naval, municipal, and ecclesiastical services, as well as many for discoveries in science, and attainments in literature and the arts.¹⁴

And finally in 1908, England passed the Old Age pension law, giving from 25c to \$1.25 per week from the public treasury, without any contribution from the beneficiary, to persons over 70 years of age whose annual income does not exceed \$105 to \$150.¹⁵

Almost all European countries have elaborate pension systems

⁸ *Burton's Exr. v. Burton's Admr.* (Va. 1840) 10 Leigh 597, 599; *Donnelly's Case* (1881) 17 Ct. Cl. 105.

⁹ *Stroud's Judicial Dict.* "Pension."

¹⁰ *In re Huggins* (1882) 21 Ch. D. 85, 51 L. J. Ch. 935, 30 W. R. 878.

¹¹ *Clarke v. Imperial Gas Co.* (1832) 4 B. & Ad. (24 E. C. L.) 315; *Gibson v. East India Co.* (1839), 5 Bing. N. C. 35 E. C. L. 262; *Marchand v. Lee, etc.* (1873) L. R. 8 Exch. 290.

¹² 6 Anne, C. 41 § 24.

¹³ 6 Encyc. Br. 411 (11th Ed.)

¹⁴ 10 Encyc. of Laws of England, p. 11, "Pension."

¹⁵ Encyc. Br. 11 Ed. "Old Age Pensions;" 3 Am. Polit. Sci. Rev. 68, Feb. 1909.

including sickness, accident, invalid and old age pensions.¹⁶ Germany for instance has had *sickness* insurance (1883), compulsory on workmen earning less than \$480 a year,—workmen paying two-thirds and employers one-third of the premiums; *accident* insurance (1884), compulsory on workmen earning less than \$720, premiums paid by employers, *invalid* and *old age* (1889), compulsory on all wage earners, earning less than \$480, employers and employees each paying one-half the premiums.¹⁷ In Italy, France, Belgium, Denmark and Spain, the states grant subsidies, in the case of sickness, invalid and old age pensions, in addition to the contributions of the employers, and employees.¹⁸ In Germany, Austria, Hungary, and Italy, sickness and old age pensions are compulsory upon all workmen receiving less than a certain wage (usually about \$480).

New Zealand, New South Wales and Victoria all have invalid and old age pensions, payable out of government funds; they also pension their civil servants, and have established state insurance agencies.¹⁹

So, too, "there is hardly a city in all Europe that does not make provision for pensioning all of its employees after they have served a given number of years, and have reached the age of 60 or 65."²⁰ In about half of them "Employees are compelled to submit to a certain deduction from their salaries to help create the pension fund, which however is largely subsidized by the city," while at least half of the European cities provide the funds without any contributions from the employees.²¹

In the United States, until very recently, pensions have been confined almost wholly to soldiers, sailors, marines, their widows, minor children, and dependent relatives; but as to these "No other nation or government in all time has dealt so liberally with its defenders." In 1636 Plymouth Colony provided that any soldier who should return maimed from the defense of the settlers should be maintained by the colony for the rest of his life, and the Virginia Assembly made similar provisions in 1644.^{21a} The National system was inaugurated by the Continental Congress in 1775, and since that time over \$4,000,000,000 have been paid. Originally pensions were paid for disability received while in service, but in 1818,—35

¹⁶ See Henderson: Industrial Insurance in U. S. (1909). Squier: Old Age Dependency in U. S. (1912).

¹⁷ Henderson, 1-12.

¹⁸ Henderson, 15-25.

¹⁹ Henderson, 36-38; Squier, 302.

²⁰ Squier, 222-4.

²¹ Squier, 223-4.

^{21a} Henderson, Industrial Insurance, 273.

years after the revolution was over, pensions were granted for *service* therein; and similar provisions have been made for those serving in the war of 1812 (56 years afterward) in the Black Hawk War, (50 years afterward), and in the Mexican War, (39 years afterward). Nurses have also been pensioned since 1893. Commissioned, and non-commissioned officers, and enlisted men retire after certain years of service, upon certain monthly payments.²² Hundreds of special or private pension acts are passed at every session of Congress,²³ and it is usual to pension the widows of ex-presidents.

Besides, there have been built 10 National Soldiers' homes, and the states have built 30 more, to which the Federal Government contributes \$100 for each inmate. Many of the states have also provided schools and homes for soldiers' and sailors' orphans.^{23a} Some of the Northern states have supplemented the gifts of the National Government by pensions to their grand army veterans, and have provided pensions for members of the National Guard,^{23b} while the Southern states have borne heavy burdens in making generous provisions for those who wore the gray.^{23c}

Our political methods and views have until recently been decidedly against civil pensions, or indeed prior to 1871, against building up an efficient civil service by stable tenure of office for faithful public service. "To the victors belong the spoils", and "turn the rascals out" were the political principles upon which our parties acted in every change of administration. Under these circumstances, it would have been preposterous to pension any large part of those who had been in office, and the tenure was so frail in most cases that there were few that had grown old in long and honorable service. It was not until Civil Service reform had become a fact under the law of 1871, that there was a body of civil officers, aside from federal judges, that could with much show of justice ask to be pensioned. And it is only since then that such a scheme has been agitated.

Since 1869, federal judges over 70 years of age have been permitted after 10 years of service to retire on full pay.²⁴ A general Civil Service bill was introduced in Congress in 1898, and an Old

²² Encyc. Brit., 11 Ed., Pensions; Squier, 229.

²³ See W. B. Hale, Pension Carnival, Capitalizing the Nation's Gratitude, 20 World's Work, Oct., Nov. and Dec., 1910, and Feb'y, 1911.

^{23a} C. L. Mich., 1897, § 2055, 2064, 2067, 2074 et seq. (P. A. 1885, 1889, 1893, 1895); 21 Encyc. Brit., 11 Ed., 122.

^{23b} Squier, 233.

^{23c} Squier, 230; Henderson, 280 et seq. reviewing plans; Rev. of Reviews, July, 1907, 40, et seq., State v. Derham (1901) 61 S. C. 258; Gill v. Dixon (1902) 131 N. C. 87.

²⁴ Act Apr. 10, 1869.

Age Pension bill in 1911. New York provides by her Constitution (Art. 6, § 13, 1891) for pensioning her judges. In 1906 Massachusetts provided for retiring her 60 year old judges on half pay after 15 years of service.²⁵ Maryland gives her ex-judges \$2,400 per year.^{25a} Kansas authorizes the payment of a pension not exceeding \$50 per month to persons over 21 who have been totally disabled by accident, and are unable to support themselves.^{25b} Illinois, Missouri and Colorado have enacted laws for pensioning mothers, and Michigan has made provisions for relief to families to enable children whose labor is needed to support the family, to attend public schools. All of the foregoing are payable out of public funds.^{25c} Massachusetts has just provided pensions and annuities, partly from public funds, for all her civil employees except elected officers.^{25d}

The perils of firemen and policemen were apparent, and early led to efforts to provide means to relieve the suffering resulting from their disability or death. New York enacted a law for pensions for firemen in 1837, and for policemen in 1878. Since that time nearly every large city has been authorized by special or general act or charter provision to establish and has established, a pension system for its firemen and policemen. The funds are usually derived from membership dues, a percentage of the revenue from city taxation, in the case of firemen, and in the case of policemen from liquor licenses, fines and costs in certain cases, and contributions or deductions from the officer's salary.²⁶

Various pension systems have also been provided for disabled or aged employees by some 20 industrial corporations, such as American Express Co. (1875), Cambria Steel Co. (1885), First National Bank of Chicago (1899), International Harvester Co. (1908), Standard Oil Co. (1909), United States Steel Corporation (1911) \$8,000,000 from the Company and \$4,000,000 from Andrew Carnegie.²⁷ The funds however are generally provided by some contributions by employers, but mostly by employees. Pension systems in which the funds are largely furnished by the companies have been adopted by our most important railway companies beginning with the Baltimore & Ohio (1884), Chicago and North Western (1900), Pennsylvania (1900), Rock Island (1909), and New York Central

²⁵ Squier, 233, 339. Henderson, 279.

^{25a} In 1904, Pub. Gen'l Laws, p. 759.

^{25b} May 13, 1911, Laws Ch. 146, p. 230.

^{25c} 7 Am. Polit. Sc. Rev., Feb., 1913, P. A. Mich. 1911, No. 198, April 29, 1911.

^{25d} Ch. 532, Laws 1911; Ch. 363, Apr. 2, 1912; Ch. 503, Apr. 16, 1912.

²⁶ Squier, 194, 211 et seq.; Henderson, 267-270.

²⁷ Squier, 67-72.

(1910); the Midland Railway Company of England seems to be the first to do this in 1859,²⁸ although the Imperial Gas Company had done so as early as 1832.

Large numbers of the labor organizations provide benefit funds for disability, death, and old age.²⁹ The funds of course are derived from assessments or contributions from the workers themselves.

As to teachers' pensions, European countries have long had efficient systems. Russia (1819), Saxony (1840), England (1848), France (1858), Austria, Belgium, Finland, Italy, Norway, Servia, Spain, and Sweden all provide for their aged teachers, as do Argentina, Australia, Chile, Japan, Mexico, Ontario, Quebec, and Switzerland. Argentina retires any member of the teaching force at the expense of the government on full salary after 20 years of service, and three-fourths salary after 15 years of continuous service.³⁰

In this country the earliest methods of providnig benefits for teachers were through voluntary associations of teachers themselves, without invoking public aid, just as had been the earliest plans among firemen and policemen, and such associations still exist in several cities.³¹ These are mostly only for sickness, and funeral expenses. Efforts to secure pension legislation for teachers began with the teachers of Brooklyn, in 1878, but the bills of 1879 and 1881 both failed to pass. New York City obtained a law in 1894, and Brooklyn in 1895³².

The origin or source of their funds are as follows:³³

(1) *State Appropriations*: Arizona (1912) and Rhode Island (1907) provide the entire fund from the state treasury. Maryland (1908) appropriates "\$28,000 annually or such amount as may be necessary." New York (1910) for teachers in state supported colleges, "entirely from state funds," and for public school teachers, (1911) "such appropriation as the legislature may make." Virginia (1910), "\$5,000 annually," and Wisconsin (1911) "10c for each

²⁸ Squier, 108-136, reviewing the systems. Henderson, Ch. VIII, 212-250, still fuller.

²⁹ Squier, 56; Henderson, 84 reviewing many of them.

³⁰ Squier, 139.

³¹ Henderson, 259.

³² Squier, 140.

³³ Squier, 139, et seq.; Henderson, 256, et seq.; Report N. E. A. 1913 (Advance sheets), II. Teachers' Pension Laws in the United States, 266 et seq., Teachers' Pension Laws in U. S. and Europe, Doc. 823, 61st Cong. 3d Sess., Feb. 17, 1911. See also A. W. Butler in 15 Rev. of Rev. (1897); Reports Comm'r Ed. 1902 (712), 1903 (2449), 1907 (448). Bulletin 23 U. S. Census Bureau, Statistics of Teachers (1905). Report N. E. A., Committee on Salaries (1905). Seventh Ann. Report of Pres. and Treas. of the Carnegie Foundation (1912) 23-81.

person of school age," from the state funds, supplemented of course by local grants or contributions from teachers, or gifts and bequests.

(2) *Local Taxation, partly or wholly*: Colorado, Denver, (1909) local taxation of 1/20 to 1/10 mill; Delaware, Wilmington, (1911), \$1,000 annually from school board, and \$2,000 from City Council; Illinois (1909) in districts from 1,000 to 100,000 population, local taxation permitted; in Chicago (1907) interest on school funds and appropriations to equal contributions from teachers; Indiana (1907) 1c on each \$100 of taxable property, in cities of 100,000 population and over; Kansas (1911), cities of first-class, not less than 1½ times salary assessments, or amount required; Maryland, Baltimore, (1912) such sums as the County Commissioners of Baltimore County may appropriate; Massachusetts (1908), except Boston, such as City Council or town appropriates; Boston (1908-1912) 5c per \$1,000 value of property; Michigan, Detroit, (1907) appropriation by Board of Education; Minnesota, (1909) cities of 10,000 population, tax of 1/10 mill; Nebraska (1909), cities of metropolitan class, 1½ times contributions from teachers' salaries; New Jersey (1896) entirely out of regular school funds the same as salaries; New York, Buffalo, appropriation by city council to amount equal to teachers' contributions, and in Rochester an amount equal to one-half of teachers' contributions; Ohio (1906-11) 1 to 2 per cent. of the money raised by local tax for school purposes; Oregon (1911) districts with 10,000 school children, 1 per cent. of taxes received; Pennsylvania (1907) districts of second and third classes, such funds as may be appropriated by school authorities; Philadelphia, (special act 1905), appropriations by School Board, \$50,000 for 1907, and after that amounts equal to teachers' contributions; South Carolina, Charleston, 4 per cent. of gross income from special school fund; Vermont, such amount as may be voted by the town; Wisconsin, Milwaukee (1909) one per cent. of school fund, not exceeding teachers' contributions.

(3) *From other public funds*: California (1901-1911), in consolidated cities and counties, one-half of amount withheld from teachers' salaries for absence, and in other districts such part of amount so withheld as may be determined by local authorities; Connecticut, New Haven (1911) amount withheld from teachers' salaries for absences; New London (1911) 5 per cent. of liquor license fees; Michigan, Detroit (1907) amounts withheld from teachers' salaries for absences; New York, Albany (1907-10) 5 per cent. of liquor licenses, and amount withheld from teachers' salaries for absence, less cost of substitutes; New York City (1894-1907),

amounts withheld from salaries for absences, and 5 per cent. of liquor licenses; Ohio (1906-11), amounts withheld from teachers' salaries for absences; Utah, cities of first and second class, amounts withheld from teachers' salaries for absences not exceeding 5 days.

(4) *Contributions from teachers*: In all of the foregoing, except in Arizona, Colorado, Maryland, Massachusetts, Rhode Island, South Carolina, and Vermont, the public contributions are supplemented by contributions from teachers' salaries, varying from 1 to 3 per cent. thereof.

(5) *Gifts and bequests*: So also provision is made in all the foregoing to be added to by gifts and bequests except in Arizona, Maryland, Massachusetts, Rhode Island, and Vermont.

The foregoing (aside from gifts and bequests) may be summarized thus:

(1) From state taxation alone,—3 states, Arizona, Maryland and Rhode Island (except Providence).

(2) From local taxation or grants alone,—4 states, Colorado, Massachusetts (except Boston), South Carolina and Vermont.

(3) From teachers' contributions only,—3 states, Kentucky (cities of first-class), Louisiana (New Orleans), Rhode Island (Providence, 1897).

(4) From teachers' contributions supplemented by *state funds*,—3 states, New York (state), Virginia, and Wisconsin.

(5) From teachers' contributions supplemented by *local grants*,—18 states, California, Connecticut (New Haven and New London), Delaware (Wilmington), Illinois, Indiana, Kansas, Maryland (Baltimore), Massachusetts (Boston), Michigan (Detroit), Minnesota, Nebraska, New Jersey, New York (13 cities), Ohio, Oregon, Pennsylvania, Utah, Wisconsin (Milwaukee).

Districts to which applied: In all 26 states have enacted laws providing for the pensioning of teachers either throughout the state, or in specified classes of districts. Arizona, California, Maryland, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, and Wisconsin,—12 states, have statewide laws; while the laws of Colorado, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Oregon, South Carolina and Utah,—14 states,—apply only to certain cities, or districts of certain classes.

Compulsory contributions: Of the 37 laws enacted in these states, 30 provide for teachers's contributions, and in 10 of these—California, Connecticut, (New Haven and New London), Illinois and Chicago, Indiana, Kentucky, Louisiana, Maryland (Baltimore), New

Jersey and Ohio,—*compulsory contributions* are required from all *new* teachers; in Kansas, the contributions are required only from those who consent, while in the other cases there seem to be no special provisions except such as may be made by the Board, Commissioners, or Trustees in whom the administration of the law is vested. In Minnesota and Oregon Retirement Fund Associations may be organized or incorporated, by consent of a majority of the teachers, and of the school or city authorities.

Control: In four states the control is vested in the State Board of Education; in six, in the local school boards; while in most cases a special Retirement Fund Board for the State or District is created and charged with administering the law.

Refunds: In Buffalo and Milwaukee if a teacher is *dismissed* or *resigns* all he has paid in is refunded; in New Haven, Illinois, Chicago, Kansas, New York City, Rochester, Ohio, Pennsylvania, and Utah, all is repaid if the teacher is *dismissed*; in Indiana, Kentucky, Louisiana, Baltimore, Boston and Wisconsin, one-half of what has been paid in is returned when the teacher is *dismissed* or *resigns*; in Illinois, Chicago, Kansas, Ohio, and Utah, while *all* is returned in case of *dismissal*, only *half* is returned if the teacher *resigns*. In Wilmington, Detroit and Oregon, it is discretionary with the Board of Control. California and New London, Connecticut, return nothing; New Haven nothing in case of *resignation*; Nebraska, nothing in case of *dismissal*, while no provisions seem to exist in Minnesota, New York (state), Albany, Providence or Virginia.

Term of service: Pension begins in case of *disability* after 2 years of service in 1 case; 5 years in 2 cases; 10 years in 3 cases; 15 years in 7 cases; 18 years in 1 case; 20 years in 11 cases; 25 years in 6 cases; no provision being made in 5 cases.

Without disability, pensions begin only after 25 years of service in 9 cases, after 30 years in 16 cases; after 35 years in 4 cases; and after 40 years in 1 case; no provisions existing in 3 cases. Required service in the district varies from 2 to 20 years. In a few cases teachers must be retired after 30 to 40 years service, and in a few cases can retire only if they are 60 to 65 years of age.

Annuities: In case of disability usually the annuity to be paid is such proportion of full annuity as the years of service bear to the term of service required for full annuity. Full annuity varies from \$200 to \$800 per year, or in many cases one-half of average annual salary for the last five years of teaching; \$400, \$500 and \$600 are the most usual maximum amounts allowed. In some cases the *annuity* cannot exceed the total amount that has been contributed by the beneficiary to the retirement fund. There seem to be no pro-

visions for refunds to the estate of a teacher dying in the service, nor are pensions granted to those who have retired before the law goes in operation. The laws however would generally apply to a teacher who, after having taught the full term of service, retires within a year after the law goes in operation, although his contribution to the retirement fund may have been very small.

The foregoing review of pension legislation shows a widespread and growing—almost universal—demand that all who have labored faithfully in service beneficial to the public for a long period of years, should be provided, in some way, with sufficient income to pass their declining years in comfort.

Is legislation to secure this valid? Of course foreign countries are not prevented from enacting such legislation by constitutional provisions. Are we by constitutional provisions prevented from reaching substantially the same results? The foregoing indicates that our legislative bodies do not consider that such provisions are generally beyond legislative power.

The Constitution of the United States provides that "no person shall be deprived of liberty or property without due process of law"; "that no *state* shall deprive any person of liberty or property without due process of law," "nor deny to any person within its jurisdiction the equal protection of the laws," "nor pass any law impairing the obligation of contracts."

The United States Constitution authorizes Congress "to lay and collect taxes to pay the debts, provide for the common defence and *promote the general welfare*"; "duties, imposts and excises shall be uniform throughout the United States," while direct taxes shall be apportioned according to population. There are no express provisions relating to education, schools, or pensions.

Most of the state constitutions forbid depriving any one of his liberty or property without due process of law. Many constitutions forbid "the grant of special privileges or immunities to any citizen or class of citizens, except in consideration of public services."³⁴ In New Hampshire no pension can be granted except in consideration of public service and not more than one year at a time, and Maryland and South Carolina are forbidden to establish any general pension system.³⁵ In many states also the legislatures can grant no extra compensation to any public officer or agent after the service is ended, or contract of service entered into.³⁶ A large number of the constitutions provide "the state shall not lend money or its credit to any indi-

³⁴ 1 Stimson's Am. Statute Law, § 17; Fed. & State Constitutions 130.

³⁵ 1 Am. St. Law, § 17; Fed. & State Consts. 130.

³⁶ 1 Stimson, § 216.

vidual, asociation, or corporation, municipal or otherwise, whatever."³⁷

Not many of the state constitutions expressly provide that taxes shall be levied for a *public purpose* only,³⁸ yet this is universally taken to be implied. In the vigorous language of our judges: "The legislature has no constitutional right to lay a tax in order to raise funds for a mere private purpose. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder."³⁹ "Taxation for private purposes is no more legal than *robbery* for private purposes."⁴⁰ "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law, and is called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation * * * * Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."⁴¹ "To take a man's property from him under pretense of taxation, for a purpose for which taxation is not admissible, is not due process of law, but an unlawful confiscation."⁴² The foregoing are not based upon express constitutional provisions, but upon general principles of constitutional law, and were not founded upon the "due process," or "equal protection" of the law, provisions of the 14th amendment. Later decisions of the United States Supreme Court have referred the decision in *Loan Ass'n v. Topeka*, to the "due process" provision of 14th amendment, and held that ordinarily that Court will not invalidate on any other ground, a state tax as not being for a public purpose, when held valid by the state courts.⁴³

The courts are not in entire accord as to what is a *public purpose*, and there seems to be no adequate test to determine. The duty to

³⁷ 1 Stimson, Am. Stat. Law, § 326; Fed. & State Consts., § 345, 282.

³⁸ Ky., Minn., Mo., Mon., Okla., S. C., Tex., Wyo., do expressly provide that taxes can be levied for public purposes only.

³⁹ Black, C. J., in *Sharpless v. Mayor of Philadelphia* (1853) 21 Pa. 147, 59 Am. Dec. 759, on 774. Cooley, J., in *People v. Salem Twp.* (1870), 20 Mich. 452, 4 Am. R. 400.

⁴⁰ Campbell, C. J., in *People v. Salem Twp.*, 20 Mich. 452 on 495.

⁴¹ Miller, J., in *Loan Ass'n v. Topeka* (1874) 87 U. S. (20 Wall) 655, on 664.

⁴² Cooley, J., in *Bay City v. State Treasurer* (1871) 23 Mich. 499, 502; In re Opinion of Justices (Mass. 1912); 98 N. E. 338; *Beach v. Bradstreet* (Conn. 1912), 82 Atl. 1030.

⁴³ *Hurtado v. California*, 110 U. S. 516; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 113, 155; *Keeney v. New York* (1912) 222 U. S. 525, 535.

determine is *primarily* upon the legislature, but subject to review by the courts, for whether the purpose is *public* or *private* is ultimately a *judicial* question. "The term 'public purpose' as employed to denote the objects for which taxes may be levied has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is on the other hand merely a term of classification to distinguish the objects for which *according to settled usage*, the government is to provide, from those which by like usage, are left to private inclination, interest, or liberality."⁴⁴

"Aid by way of taxation to any class of manufacturers is not such a public purpose * * * If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."⁴⁵ "No enterprise can be properly regarded as a public enterprise in which the public has no voice."⁴⁶

Upon the other hand, however, Justice Miller says: And in deciding whether in a given case the purpose is public or not the legislature "must be governed mainly by the course and usage of the government, the objects for which taxes have been *customarily* and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or Municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though it may not be the only criterion of rightful taxation."^{46a} "The legislature may recognize claims founded in equity, and justice or in gratitude or charity, and may make appropriations of public money whenever the public well-being requires or will be promoted by it, and it is the judge of what is the public good."^{46b} And Judge Cooley has likewise said: "Necessity alone is not the test by which the limits of State authority

⁴⁴ Cooley, J., in *People v. Salem Twp.* (1870) 20 Mich. 452, 485.

⁴⁵ Miller, J., in *Loan Ass'n v. Topeka* (1874) 87 U. S. 655, 665.

⁴⁶ Campbell, C. J., in *People v. Salem Twp.* (1870) 20 Mich. 452, 495.

^{46a} *Loan Ass'n v. Topeka* (1874) 87 U. S. 655, 665.

^{46b} Denio, J., in *Town of Guilford v. Supervisors of Chenango Co.* (1855) 13 N. Y.

in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and *embrace others which may tend to make that government subserve the general well-being of society and advance the present and prospective happiness and prosperity of the people.* To erect the public buildings, to compensate the public officers and discharge the public debts are not the sole purposes to which the public revenues may be applied, but, on the contrary *considerations of natural equity, gratitude and charity are never out of place when the general good of the whole people is in question, and may be kept in view in the imposition of the public burdens.* The sovereign legislative authority must judge of the force of such considerations, on a general view of the just and proper demands upon the public treasury, and of the ability of the people to provide for all; and when that authority determines that such payments will subserve the public good, the responsibility of the legislator for the correctness of his judgment must be to the people whose representative he is and upon whom the burdens he imposes must rest."⁴⁷

"A tax is for a public purpose where it is for the support of the government, or for any of the recognized objects of government, or if the proceeds will directly promote the welfare of the community in equal degree." The test is: "Will it serve a recognized object of government, and will it promote the welfare of the people of the state in equal degree?"⁴⁸

The courts also are not quite in accord in their views as to interpreting constitutions. Judge COOLEY says: "Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power."⁴⁹

On the other hand Judge CHRISTIANCY, in an early case says: "An

⁴⁷ *People v. Salem Twp.* (1870) 20 Mich. 452, 475.

⁴⁸ *Beach v. Bradstreet* (Conn. 1912) 82 Atl. 1030.

⁴⁹ *Cooley, J., in Bay City v. State Treasr.* (1871) 23 Mich. 499, on 506.

act of the state legislature not prohibited by the express words of the constitution or by necessary implication, cannot be declared void as a violation of that instrument. In cases of doubt every possible presumption not clearly inconsistent with the language and subject matter is to be made in favor of the constitutionality of state legislation."⁵⁰ This doctrine was further elaborated by the same judge in a later case, in which Judge COOLEY also said, "every enactment of the state legislature is presumed to be constitutional and valid; that before we can pronounce it otherwise we must be able to point out the precise clause in the constitution which it violates, and that the conflict between the two must be clear or free from reasonable doubt."⁵¹ And in his vigorous dissenting opinion in *People v. Salem*, Judge GRAVES quotes these rules against the majority opinion, and adds: "The judiciary has no preëminent claim to infallibility, and so long as judges are but men, they must continue to be subject to all the infirmities which waylay and beset the rest of mankind."⁵² In this case, CAMPBELL, COOLEY and CHRISTANCY all held that aid by taxation toward the construction of a railroad to be operated by a railroad company was unconstitutional because it was for a private and not for a public purpose. This doctrine was immediately repudiated by the United States Supreme Court,⁵³ and while it yet seems to be the rule in Michigan⁵⁴ it has been held otherwise in all the other states,—Iowa and Wisconsin having overruled their earlier views.⁵⁵

In a late case it is said: "In the absence of an express command or prohibition, general constitutional language is to be construed in the light not only of the conditions prevailing at the time of adoption of the constitution, but also with reference to the changed social, economic and governmental conditions and ideals of the time as well as the problems which such changes have produced."⁵⁶ In late cases it is also said: "The taxing power is unlimited except by express constitutional provisions,"⁵⁷ and "to justify a court in declaring a

⁵⁰ *Sears v. Cottrell* (1858) 5 Mich. 251.

⁵¹ *People v. Blodgett* (1865) 13 Mich. 127, 150, 152, 161.

⁵² *Graves, J., in People v. Salem* (1870) 20 Mich. 452, 503.

⁵³ *Railroad Co. v. County of Otoe* (1872) 83 U. S. (16 Wall.) 667; *Olcott v. Supervisor* (1872) 83 U. S. (16 Wall.) 678; *Township of Pine Grove v. Talcott* (1873) 86 U. S. (19 Wall.) 666; *Taylor v. Ypsilanti* (1881) 105 U. S. 60.

⁵⁴ *Dodge v. Van Buren Circuit Judge* (1898) 118 Mich. 189.

⁵⁵ *Gray, Limitation on Taxing Power*, §§ 197, 199.

⁵⁶ *Winslow, C. J., in Borgins v. Falk Co.* (1911) 147 Wis. 327, 133 N. W. 209, two judges, Barnes and Marshall, concurring in the result, but demurring to this rule of constitutional interpretation.

⁵⁷ *Harders Fire Proof Storage Co. v. Chicago* (1908) 235 Ill. 58, 85 N. E. 245; *Salt Lake City v. Christensen* (1908) 34 Utah 38, 95 Pac. 523.

tax void, and arresting proceedings for its collection, *the absence of all possible public interest in the purposes for which the funds are raised must be so clear and palpable as to be immediately perceptible to every mind.* Claims founded in equity and justice in the largest sense of these terms or in gratitude or charity will support a tax."⁵⁸

While the Federal Government is one of limited powers, Congress is given power to lay and collect taxes to pay the debts and provide for the general welfare. The "general welfare" here undoubtedly is substantially equivalent to "public purpose" for which taxes may be levied according to the rules above given, and in that view the practice of the Federal government throws much light upon what is a "*public purpose*."⁵⁹ To raise revenue is not the only purpose for which the taxing power may be used; it may be used for regulation as well. For example to prevent state bank circulation,⁶⁰ or regulate immigration,⁶¹ or prevent the coloring of oleomargarine to look like butter,⁶² or on inheritances,^{62a} or for internal improvements,⁶³ or for protection of home industries,⁶⁴ or to pay a bounty to a manufacturer of sugar.⁶⁵ In the last case the Supreme Court says: "The term *debts* includes those debts or claims which rest upon merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. Payments to individuals not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money ever since its foundation. Some of the acts were based upon considerations of pure charity." In more than forty instances Congress has appropriated money to private individuals, for suffering from earthquakes, cyclones, pestilence, fire, fever, famine and flood.⁶⁶ These seem never to have been questioned.

As to pensions by the United States, FIELD, J., says: "Power to grant pensions is not controverted, nor can it well be, as it was

⁵⁸ Ingleside Ass'n v. Nation (Kans. 1910) 109 Pac. 984.

⁵⁹ Gray, Limitations of Taxing Power, §§ 697, 698.

⁶⁰ Veazie Bank v. Fenno., 8 Wall. 533.

⁶¹ Edye v. Robertson, 112 U. S. 580.

⁶² McCray v. U. S. (1904) 195 U. S. 27, 24 Sup. Ct. 769; see 6 Mich. L. R. 277; Knowlton v. Moore (1899), 178 U. S. 41, 20 Sup. Ct. 747.

^{62a} Knowlton v. Moore (1899), 178 U. S. 41, 20 Sup. Ct. 747.

⁶³ Willoughby, Constitution, § 269, 589.

⁶⁴ Story's Const., Vol. 1, § 958.

⁶⁵ U. S. v. Realty Co. (1896) 163 U. S. 427, on 440.

⁶⁶ Senator Daniel, Speech on Blair Educational Bill, Cong. Rec. XXI, Pt. 3, 2295, 1890. The recent session granted large sums for the relief of the sufferers by the Mississippi floods.

exercised by the states and by the Continental Congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and has been continued without interruption, or question to the present time."⁶⁷ Congress is empowered to raise and support armies, and may select the means most suitable for this purpose; pay, bounties, and pensions, are the most efficient means to induce the citizen "to come forward, enlist, and do battle to protect and defend the rights, interests and honor of the nation."⁶⁸ "Congress has the right to give, withhold, distribute, or recall at its discretion."⁶⁹ "The whole control of the matter is within the domain of Congressional power."⁷⁰ And as we have seen, the government makes provision for these pensions out of the public revenues, and has exercised the power in every conceivable way, for disease, disability, death; for service without disability, or poverty, and years after service was rendered, with no thought or promise of such when the service was being rendered. And Congress too has the right to regulate the payment, receipt, and exemption of the pension, in such way as it may deem wise, without reference to the police power or authority of the states, even though state officers are used in the distribution or payment thereof."⁷¹

Under this broad interpretation of "promoting the general welfare," including the "public purposes" above indicated, there is no doubt but that Congress if it saw fit could "lay and collect taxes" to provide pensions for its civil officers, or for the school teachers of our land. The encouragement of education is a "public purpose" inextricably connected with the "general welfare" policies of our Nation and States. In 1524 Luther, saying the real wealth of a city, its safety and force, is an instructed and honest citizenship, demanded that schools be established in all the villages of Germany. This was done in Saxony in 1528, and in Wurtemberg in 1559, and our Dutch ancestors brought these ideas with them when they settled in New York; so, too, schools were established in Virginia in 1619; although they could not survive the Indian massacre and Governor Berkely. In 1635, a Boston school teacher was employed; in 1636 public funds were voted for the support of the school that grew into Harvard College, and by 1647, the Massachusetts public school system, the model for all our states, was established on the

⁶⁷ U. S. v. Hall (1878) 98 U. S. 343, 346.

⁶⁸ U. S. v. Fairchild (1867) 25 Fed. Cas., No. 15067.

⁶⁹ U. S. v. Teller (1882) 107 U. S. 64, 68.

⁷⁰ Frisbie v. U. S. (1894) 157 U. S. 160.

⁷¹ U. S. v. Hall (1878) 98 U. S. 343; U. S. v. Van Leuven, 62 Fed. R. 52.

fundamental principles: that universal education is necessary to the well being of the state; while the obligation rests primarily on the parent, the state has the right to fix the standard and amount, and enforce it; that public money may be raised by a general tax, though attendance is not general; and that higher or the highest education, can be furnished at public expense as well as primary.⁷² By the constitution of nearly all the states it is made the duty of the legislature to encourage schools and the means of education "and to provide" for a system of free schools.^{72a} In fact our doctrine really is: "Free schooling furnished by the state is not so much a right granted to the pupils as a duty imposed upon them for the public good."^{72b}

Our National Policy has been the same. The Land Ordinance of 1785, gave one thirty-sixth of the land of the North West territory,—one section in each township, for public schools in the township. The ordinance of 1787, provided that "schools and the means of education shall forever be encouraged"; prior to 1848, each state admitted to the Union set aside section sixteen in each township for common schools, and in states admitted since 1848 two sections have been set aside in each township. In 1862 the National land grant was made to Agricultural Colleges; and the land grants to these and to common school purposes aggregated by 1900, eighty-six million acres,—one hundred and thirty-five thousand square miles,—a territory larger than Prussia, or than Great Britain and Holland together. The Military Academy was founded in 1802, and the Naval in 1845. The Bureau of Education was established in 1867. In 1887 a perpetual endowment was granted to the Agricultural Experiment stations in the States, and in 1890, a similar endowment to the Agricultural Colleges. In 1872, a bill was introduced into Congress to establish an educational fund out of proceeds of sale of public lands, one half to be invested in United States bonds to be turned over to the states and subject to their control, for common school purposes. A similar project was contemplated by the Blair educational bills, between 1880-1890; and while these bills did not pass, their constitutionality was scarcely questioned. In furthering the work of education and investigation the United States have established the Coast Survey, the Astronomical Observatory, the Light House Board, the Patent Office, the Geological Survey, the Agricultural Colleges, the varied scientific work of the Department

⁷² *Encyc. Brit.*, 11 Ed., "Education."

^{72a} *Stimson, Fed. and State Constitutions*, 140, §§ 51, 51 Bk. III.

^{72b} *Fogg v. Board of Education* (1912) 71 N. H. 296, 82 Atl. 173, 37 L. R. A. (N. S.) 1110.

of Agriculture, and Experiment Stations; conducted the great surveys for the Pacific Railroads, carried on scores of scientific expeditions in all parts of the world, and aided the Smithsonian Institution.⁷³ In short the National Government has done almost everything to foster education in all its grades, and it undoubtedly, so far as appropriating funds raised by taxation is concerned, could provide for the retirement and pensioning of teachers in the public schools, as certainly as it could for its civil servants or its soldiers and sailors.

Further, so far as the Federal Government is concerned it is not likely that it will ever hold in the light of this practice, that such a purpose is not a "*public purpose*" within the taxing power of the Federal Government or of the states, or that such will deprive any tax payer of his property without due process of law, or, if it otherwise conforms to constitutional provisions, denies to any one the equal protection of the laws. And while perhaps the Federal Courts would have the power to hold that what the state courts said was a *public purpose*, was not so, it is very unlikely that they will do so.^{73a}

The Federal Government has established a police pension fund by contributions retained from salaries of policemen while in the public service. It has recently been enforced by the Supreme Court of the District.^{73b} The proposed bill of 1898 provided for retaining two per cent of the salary of civil officers, and the proposed teachers' pension act for District of Columbia required contributions from teachers; they undoubtedly would be held valid also;⁷⁴ whether they would be taxes or not and be required to conform to requirements of equality and uniformity is discussed below. In support of the view above that a Federal teachers' pension fund could constitutionally be established out of the Federal revenues, it is proper to refer to an article by Professor Goodnow, concluding that a Federal Old Age pension law would be constitutional.⁷⁵

When we come to consider what is a "public purpose," in the states, justifying taxation and appropriation of public funds, we are met with much variety of opinion and conflict of decision.

As stated above a tax or appropriation in aid of the construction of a railroad is for a *public purpose*, by practically all the decisions except Michigan;⁷⁶ but a tax in aid of a private manufacturing con-

⁷³ Encyc. Brit., 11 Ed., "Education."

^{73a} *Olcott v. Supervisors*, 16 Wall. 689; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Welch v. Swayzey*, 214 U. S. 91.

^{73b} *Rudolph v. U. S.* (1911) 36 App. Cas. (D. C.) 379.

⁷⁴ *Noble State Bank v. Haskell*, 22 Okl. 48, 94 Pac. 590, 219 U. S. 104, 31 S. Ct. 186, 32 L. R. A. (N. S.) 1062.

⁷⁵ 5 Am. Polit. Science Rev., May, 1911, p. 194.

⁷⁶ *Gray, Limitation on Taxing Power*, § 194, collecting cases. *People v. Salem Twp.* 20 Mich. 452, *Dodge v. Van Buren Cir. Judge*, 118 Mich. 189.

cern,⁷⁷—such as a bridge shop,⁷⁸ iron or steel foundry,⁷⁹ woolen or cotton mill,⁸⁰ lumber or saw mill,⁸¹ sugar factory,⁸² or mining is not.⁸³ Under the first Michigan constitution the salt bounty of 10c per bushel was considered valid.⁸⁴ And it has been held that a tax to aid in the construction of a grist-mill is for a public purpose.⁸⁵ But whether a Federal bounty for sugar manufacture is valid or not, seems unsettled by the Federal decisions.⁸⁵ The encouragement of manufactures by protective tariffs by the Federal government is generally considered a "public purpose."

Of course taxes for public buildings,⁸⁶ or parks,⁸⁷ or municipal gas or water works,⁸⁸ or for the preservation of the public health, such as preventing smallpox,⁸⁹ or for draining marshes and ponds,⁹⁰ or to construct levees to prevent overflow of streams,⁹¹ are public purposes.

Public charities are usually considered as being proper subjects of state aid, as an orphans' or old ladies' home conducted by a private corporation,⁹² or for the treatment or cure of drunkards;^{92a} or care or medical attendance for the poor.^{92b}

⁷⁷ C. B. U. P. R. R. Co. v. Smith, 23 Kans. 745, Opinion of Judges, 58 Me. 590.

⁷⁸ Com. Bk. v. Iola, 2 Dill. 353; Loan Ass'n v. Topeka, 20 Wall. 655.

⁷⁹ Cole v. LaGrange, 19 Fed. 871.

⁸⁰ Cook v. Mfg. Co., 1 Sneed (Tenn.) 698; McConnell v. Ham, 16 Kansas 228.

⁸¹ Allen v. Inhabitants, 60 Me. 124, 11 Am. R. 185; Weismer v. Douglas, 64 N. Y. 91, 21 Am. R. 586.

⁸² Sugar Co. v. Auditor General (1900) 124 Mich. 674, 56 L. R. A. 329, 83 Am. St. R. 354; Minnesota Sugar Co. v. Iverson (1903) 91 Minn. 30, 97 N. W. 454; Oxnard Beet Sugar Co. v. Neb., 105 N. W. 716; Dodge v. Mission Twp. (1901) 107 Fed. 827, 54 L. R. A. 242.

⁸³ Smatter Co. v. Nicols (1908) 152 Cal. 688, 93 Pac. 872.

⁸⁴ People v. State Audr. (1861) 9 Mich. 327; East Saginaw Mfg. Co. v. East Saginaw (1869) 19 Mich. 259.

⁸⁵ Township of Burlington v. Beasley, 94 U. S. 310; Field v. Clark, 143 U. S. 649, U. S. v. Carlisle, 5 D. C. App. 138; U. S. v. Realty Co., 163 U. S. 427.

⁸⁶ Williams v. School District, 33 Vt. 271; Harris v. Dubuclet, 30 La. Ann. 662.

⁸⁷ Attorney Gen'l v. Burrell, 31 Mich. 25; County Court v. Griswold, 58 Mo. 175; Matter of Commrs. of Central Park, 50 N. Y. 493; Dunham v. People, 96 Ill. 331.

⁸⁸ Nelson v. City of La Porte, 33 Ind. 258; Western S. F. Soc'y v. Philadelphia, 31 Pa. St. 175; Atty. Gen'l v. Eau Claire, 37 Wis. 400; Wells v. Atlanta, 43 Ga. 67.

⁸⁹ Solomon v. Tarver, 52 Ga. 415.

⁹⁰ Anderson v. Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63; Sessions v. Counclinton, 20 O. St. 349; Donnelly v. Decker, 58 Wis. 461, 46 Am. R. 637; Zigler v. Menges (1889) 121 Ind. 99, 16 Am. St. R. 357.

⁹¹ Egyptian Levee v. Harden, 27 Mo. 495, 72 Am. Dec. 276.

⁹² Shepherd's Fold v. Mayor, 96 N. Y. 137; Ingleside Ass'n v. Nation (1910) 83 Kansas 172, 109 Pac. 984, 29 L. R. A. (N. S.) 190; Harger v. Children's Home (1904) 119 Ky. 235, 67 L. R. A. 815, 83 S. W. 605.

^{92a} Mayor v. Keeley Institute, 81 Md. 106; In re House (Cal.) 46 Pac. 117; White v. Inebriates' Home, 141 N. Y. 123. Contra, Wisconsin Keeley Inst. Co. v. Milwaukee Co. (1897) 95 Wis. 153, 60 Am. St. R. 105.

^{92b} Webster v. Police Jury (1899) 51 La. Ann. 1204, 25 So. 988. Hutchinson v. Inhab. of Carthage (1909) 105 Me. 134, 73 Atl. 825.

Also the discharge of moral or equitable obligations, where there are no legal obligations,^{92c} as indemnifying an officer for defending actions brought against him for the faithful performance of his duties,⁹³ or to replace money stolen without fault of an officer,⁹⁴ but not merely to repay a private claim or loss, as for loss because a contractor for a public building failed to pay for material before he became insolvent,⁹⁵ or for the loss of an arm by a guard at the penitentiary while he was discharging his duties,⁹⁶ or to compensate one who claims to have been unlawfully convicted and imprisoned in the penitentiary,⁹⁷ nor for extra pay for work for the public beyond the contract price,⁹⁸ or extra compensation to pages, porters, etc. of the legislature after the work was done,⁹⁹ or to repay money borrowed without authority.^{99a}

Appropriations by the Federal Government to aid sufferers from great calamities, as we saw above, are considered valid, but the state decisions are not in accord; aid to destitute farmers because of pestilence, drouth, or destruction by storm have been held valid,¹⁰⁰ but aid for sufferers from fire or flood, otherwise.¹⁰¹

It seems also that a town may tax itself to celebrate its own centennial,¹⁰² or to entertain distinguished visitors,¹⁰³ or the state may tax itself for a fair or to make an exhibit at the World's Fair at Chicago,¹⁰⁴ but not to exhibit the Liberty Bell at New Orleans,¹⁰⁵ or

^{92c} *Detroit v. D. U. Ry.* (1903) 133 Mich. 608; *Millard v. Roberts* (1906) 202 U. S. 429, 26 S. Ct. 674; *Lehigh Valley R. R. v. Canal Bd.* (1911) 125 N. Y. S. 227, 130 N. Y. S. 978, 204 N. Y. 471.

⁹³ *Pike v. Middleton*, 12 N. H. 278; *Gilbert v. Supervisors*, 13 N. Y. 143; *Briggs v. Whipple*, 6 Vt. 95; *Sherman v. Carr*, 8 R. I. 431; *Civic Federation v. Salt Lake Co.* (1900) 22 Utah 6, 61 Pac. 222.

⁹⁴ *Board of Education v. Landsborough*, 36 O. S. 227, 38 Am. Rep. 582.

⁹⁵ *Conlin v. Board of Supervisors* (1891) 92 Cal. 53, 27 Am. St. R. 95; *State v. Houser* (1905) 125 Wis. 256, 104, N. W. 77, 110 Am. St. R. 824.

⁹⁶ *Bourn v. Hart* (1892) 93 Cal. 321, 27 Am. St. R. 203.

⁹⁷ *Allen v. Board of State Audrs.* (1899) 122 Mich. 324, 81 N. W. 113, 80 Am. St. R. 573.

⁹⁸ *Anderson v. Hill* (1884) 54 Mich. 477; *Davis v. Supervisors* (1887) 64 Mich. 404.

⁹⁹ *Robinson v. Dunn* (1888) 77 Cal. 473, 11 Am. St. R. 297.

^{99a} *McCurdy v. County of Shiawassee* (1908) 154 Mich. 550.

¹⁰⁰ *Re House Roll*, 31 Neb. 505; *State v. Nelson*, 1 N. D. 88, 8 L. R. A. 283, 26 Am. St. R. 609; *State v. Davidson* (1902) 114 Wis. 563; 90 N. W. 1067, 58 L. R. A. 739; *Contra, State v. Osawkee Twp.*, 14 Kans. 418, 19 Am. Rep. 99.

¹⁰¹ *Lowell v. Boston*, 111 Mass. 454, 15 Am. R. 39; *Patty v. Colgan* (1893) 97 Cal. 251; *Feldman v. City Council*, 23 S. C. 57, 55 Am. R. 6. The Michigan Legislature has within the last few days appropriated \$25,000 to aid the sufferers in the Ohio floods.

¹⁰² *Hill v. Easthampton*, 140 Mass. 381.

¹⁰³ *Tatham v. Philadelphia*, 11 Phil. 276.

¹⁰⁴ *Kentucky Live Stock Ass'n v. Hager* (1905) 120 Ky. 125, 85 S. W. 518; *Daggett v. Colgan* (1891) 92 Cal. 53, 27 Am. St. R. 95; but see *Hayes v. Douglas Co.* (1896) 92 Wis. 429, 53 Am. St. R. 926, 935.

celebrate the Fourth of July,¹⁰⁶ or Cornwallis's surrender,¹⁰⁷ although the Legislature of Pennsylvania may attend the dedication of the Grant Memorial in New York, and charge up to the State \$1,700 for food, and \$3,000 for wines while on the junket.¹⁰⁸

The encouragement of agriculture and stock breeding, through fairs supported in part by taxation is a "public purpose"¹⁰⁹ but an appropriation of \$1,000 to a voluntary corn improvement association composed of persons actively interested in the improvement of corn is unconstitutional.^{109a}

As we have already seen the encouragement of Education is enjoined on the legislatures by constitutional provisions, and taxes, state, county or municipal—for public schools of whatever grade or purpose,—primary and common,¹¹⁰ secondary or high,¹¹¹ normal,¹¹² forestry,¹¹³ technical,¹¹⁴ or university¹¹⁵ under public control,—are for a public purpose.¹¹⁶ But they must provide for the equal education of all,¹¹⁷ and aside from certain incidental charges must be free to all.¹¹⁸ The State may extend aid to indigent children,¹¹⁹ and buy text-books for them if too poor to buy them themselves, but not otherwise,¹²⁰ or provide transportation for distant scholars at public expense,¹²¹ but may not establish free university scholar-

¹⁰⁶ *The Liberty Bell*, 23 Fed. 843.

¹⁰⁶ *Hodges v. Buffalo*, 2 Denio 110; *Hood v. Lynn*, 1 Allen 103; *New London v. Brainard*, 22 Conn. 552.

¹⁰⁷ *Tash v. Adams*, 10 Cush. 252.

¹⁰⁸ *Russ v. Commw.* (1905) 210 Pa. 544, 105 Am. St. R. 825, 60 Atl. 169.

¹⁰⁹ *Harding v. Bader*, 75 Mich. 321, C. L. 1897, §§ 5942-5972; *Kentucky Live Stock Ass'n v. Hager* (1905) 120 Ky. 125, 85 S. W. 518.

^{109a} *Michigan Corn Imp. Ass'n v. Auditor Gen'l* (1907) 150 Mich. 69.

¹¹⁰ *Commonwealth v. Hartman*, 17 Pa. 118; *Opinion of Judges*, 58 Me. 582.

¹¹¹ *Richards v. Raymond*, 92 Ill. 612, 34 Am. R. 151, *Smith v. Simmons* (1908) 129 Ky. 93, 110 S. W. 336, 130 Am. St. R. 426.

¹¹² *Briggs v. Johnson Co.*, 4 Dill. 148; *Ranson v. Rutherford Co.* (1910) 123 Tenn. 1, 130 S. W. 1057, Ann. Cas. 1912 B. 1356; *State Female Normal School v. Auditors*, 79 Va. 233; and in Pennsylvania even though they are private corporations, *Commw. v. Yetter*, 190 Pa. St. 488, 43 Atl. 226.

¹¹³ *People v. Brooklyn Cooperage Co.* (1907) 187 N. Y. 142, 79 N. E. 866.

¹¹⁴ *Maxcy v. City of Oshkosh* (1909) 144 Wis. 238, 128 N. W. 899, 31 L. R. A. (N. S.) 787.

¹¹⁵ *Marks v. Trustees Purdue Univ.* 37 Ind. 155.

¹¹⁶ *Merrick v. Inhabitants of Amherst*, 12 Allen 500; *Livingston v. Darlington*, 101 U. S. 407; *Hensley Twp. v. People*, 84 Ill. 544; *Malone v. Williams* (1907) 118 Tenn. 390, 103 S. W. 798, 121 Am. St. R. 1002.

¹¹⁷ *Puitt v. Comms.* (1886) 94 N. C. 709, 55 Am. R. 638; *McFarland v. Goins* (Miss. 1909) 50 So. 493.

¹¹⁸ *State v. Univ. of Wisconsin*, 54 Wis. 159; *Bryant v. Whisenant* (1910) 167 Ala. 325, 52 So. 525, 140 Am. St. R. 41.

¹¹⁹ *Shelby County Council v. State* (1900) 155 Ind. 216, 57 N. E. 712.

¹²⁰ *Harris v. Kill* (1903) 108 Ill. App. 305.

¹²¹ *Fogg v. Board of Ed.* (1912) 71 N. H. 296, 82 Atl. 173, 37 L. R. A. (N. S.) 1110; See also 38 L. R. A. (N. S.) 710; *School Dist. v. Alzenweiler*, 67 Kansas 609, 73 Pac. 927.

ships at public expense for impecunious candidates who successfully pass competitive examinations,¹²² nor levy tax for support of private schools.^{122a}

The state however cannot divide among its citizens public moneys,¹²³ nor build houses to be sold to wage earners,¹²⁴ or furnish coal to the people,¹²⁵ or extend aid to soldiers without reference to their need, disability, age, or service¹²⁶ nor pay \$25 to every blind person 21 years old, or over,¹²⁷ nor aid an art museum under private control,¹²⁸ nor pay a dog tax over to a private society for prevention of cruelty to animals.^{128a}

There is however another class of cases in which the states have exerted the taxing power as a police regulation, whereby certain persons are required to make contributions for the benefit or protection of others in the community, such as requiring a license fee from those giving shows, dances, concerts, to be paid to a charity hospital,¹²⁹ or the payment of a dog tax to pay sheep owners for sheep killed by dogs,¹³⁰ or the payment of \$10 per year by the sellers of liquors toward a fund for the foundation and maintenance of an inebriate asylum,¹³¹ or the payment of a license fee by foreign fire insurance companies for the benefit of firemen's pension funds,¹³² and contributions by banks toward a fund for the guaranty of bank deposits.¹³³ All these have been held to be valid police and tax regulations for a public purpose. In some cases the line between

¹²² *State v. Switzler* (1898) 143 Mo. 287, 40 L. R. A. 280, 65 Am. St. R. 653.

^{122a} *Curtis v. Whipple*, 24 Wis. 350, 1 Am. R. 187; *Jenkins v. Andover*, 103 Mass.

94.

¹²³ *Hooper v. Emery*, 14 Me. 375.

¹²⁴ *Opinion of Justices* (1912) 211 Mass. 624, 98 N. E. 611.

¹²⁵ *Opinion of Justices* (1893) 155 Mass. 598, 15 L. R. A. 809.

¹²⁶ *Beach v. Bradstreet* (Conn. 1912) 82 Atl. 1030.

¹²⁷ *Auditor Lucas Co. v. State* (1906) 75 O. St. 114, 7 L. R. A. (N. S.) 1196, 78 N. E. 955.

¹²⁸ *State v. City of St. Louis* (1909) 216 Mo. 47, 115 S. W. 534, two judges dissenting; Ohio seems to have done this as to the Archaeological Society.

^{128a} *Fox v. Mohawk, etc., Humane Society* (1901) 165 N. Y. 517, 80 Am. St. R. 767, 59 N. E. 353.

¹²⁹ *Charity Hospital v. DeBar*, 11 La. Ann. 385.

¹³⁰ *Van Horne v. People*, 46 Mich. 183; *Holst v. Roe*, 39 O. St. 340; *Cole v. Hall*, 103 Ill. 30; *Mitchell v. Williams*, 27 Ind. 62; *Blair v. Forehand*, 100 Mass. 136; *McGlone v. Warnock*, 129 Ky. 274, 17 L. R. A. (N. S.) 855, 111 S. W. 688; *People v. Delaney* (1911) 130 N. Y. S. 833, 131 N. Y. S. 1137.

¹³¹ *State v. Cassidy*, 22 Minn. 312.

¹³² See cases discussed below. *Fire Dep't v. Noble*, 3 E. D. Smith 440; *Fire Department v. Wright*, 3 E. D. Smith, 453 (affirmed by Court of Appeals); *Firemen's Benefit Ass'n v. Lounsbury*, 21 Ill. 511, 74 Am. D. 115. The cases are not in entire accord.

¹³³ *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 299; *Shallenberger v. First State Bank*, 219 U. S. 114, 31 Sup. Ct. 189; *Assaria State Bank v. Dolley*, 219 U. S. 121, 31 Sup. Ct. 189.

public and private purpose was made to depend upon whether the *control* of the expenditure was in *private* hands, or under direction of public officers. This was the distinction made and the basis of the decisions in the early cases of appropriation in aid of railroads, but this even as to railroads has been abandoned in all the states but Michigan. The same view was taken as to charitable institutions, but there are many recent cases holding that private control does not make the purpose private.^{133a}

When we come to consideration of pensions and bounties for soldiers, the state courts have not been so liberal in their sustaining such legislation as the Federal courts. We saw above that the Federal government had granted pensions to soldiers either for disability, age, infirmity, or service, without reference to whether the service was rendered before, during, or after the law was enacted, and without reference to the need of the recipient. The bounty, according to the federal view, "for military or naval service need not be promised before the service but may come afterward as a gratuity,"¹³⁴ and in Wisconsin it was said "gratitude to a soldier for his services, be he volunteer, substitute, or drafted man, will sustain a tax for bounty money to be paid to him or his family,—the bounty is not a private transaction in which the individual alone is benefitted. *The object is not to obtain money for the volunteer, but for the community which is to be relieved by the volunteer*; and so far as the public interest is concerned in being relieved from a draft there is no distinction between paying bounties to them and to those who volunteer."¹³⁵ Also the state may raise money by taxation to reimburse a city for bounties paid volunteers,¹³⁶ or to repay individuals who contributed to a common fund for the purpose of inducing individuals to enlist.¹³⁷ The states however make a distinction between bounties offered to induce a person to enlist, or to repay a town or individual for offering bounties or contributing toward a common fund to volunteers, or relieve a town from a draft, and to repay an individual the sum he paid for a substitute.¹³⁸ The latter is for a *private* and not *public* use.

^{133a} See cases cited above in notes 46, 53, 76, 92, 92a, 92b, 122a, 128a.

¹³⁴ *Cole v. U. S.* (1899) 34 Ct. of Cl. 446.

¹³⁵ *Brodhead v. Milwaukee* (1865) 19 Wis. 624, 88 Am. D. 711.

¹³⁶ *Lowell v. Oliver* (1864) 8 Allen 247.

¹³⁷ *Freeland v. Hastings* (1865) 10 Allen 570; *People v. Hammond* (1865) 13 Mich. 247; *Smith v. Auditor* (1890) 80 Mich. 205; *Kunkle v. Town of Franklin* (1868) 13 Minn. 127, 97 Am. D. 226; *Grim v. Weissenberg School Dist.* (1868) 57 Pa. St. 433, 98 Am. D. 237.

¹³⁸ *Perkins v. Milford* (1871) 59 Mo. 315; *Kelly v. Marshall* (1871) 69 Pa. St. 319; *Mead v. Acton* (1885) 139 Mass. 341; *Bush v. Board of Supervisors* (1899) 159 N. Y. 212, 70 Am. St. R. 538.

The distinction is well illustrated by *Thompson v. Inhabitants of Pittston*,¹³⁹ where a tax was levied to repay one who had paid \$300 under the draft act which assigned to various counties and towns a certain number of men to be raised for the army, from among the able bodied,—and when one was selected he must either go, get a substitute, or pay the government \$300; held the tax to repay one who had been drafted, and paid the \$300 instead of going or finding a substitute, was invalid, as for the purpose of paying a mere debt of the individual, whereas a tax to give him a bounty or pension for actually going even after he had gone would be valid,—for ‘it might benefit the public by showing the sympathy of his fellow citizens, and thereby encourage the soldiers to render better services.’ This is in accord with the rule that sustains the tax or pension, “if there is the least probability of promoting the public welfare.”¹⁴⁰ This distinction has been preserved and the rule followed in many Massachusetts cases, as a tax to give bounty to veterans who did not receive them at the time of their enlistment,¹⁴¹ or to increase their pay after the service, because others got more pay,¹⁴² is not for a public purpose; but a statute authorizing the raising of money by tax “to promote loyalty and patriotism by payment of money, or erecting monuments, or the bestowals of medals or decorations of honor,”¹⁴³ and “a gratuity of money,” given as a “testimonial for meritorious service” and in recognition of the services rendered and sacrifices made” by a soldier who “enlisted in his own proper name from purely patriotic motives, and without the payment of a bounty, and received an honorable discharge” is within the taxing power as for a “public purpose.”¹⁴⁴ But a grant of “state aid” to all, the well to do, and the needy, soldiers, without reference to disability, necessity, age, or exceptional service, is not such a public purpose as will support the tax.¹⁴⁵ The court declined to pass on the validity of a pension system, enacted 50 years after the service was rendered, saying that the justification “if found at all must be in its public purposes, and that in its incitement to patriotism.” It held “State aid” meant “support for the needy,” and as the act did not limit the appropriation to such nor even to such soldiers as

¹³⁹ *Thompson v. Inhab. of Pittston* (1871) 59 Me. 545.

¹⁴⁰ *Booth v. Woodbury* (1864) 32 Conn. 118.

¹⁴¹ *Opinion of Justices* (1904) 186 Mass. 603.

¹⁴² *Opinion of Justices* (1906) 190 Mass. 611.

¹⁴³ *Opinion of Justices* (1906) 190 Mass. 611.

¹⁴⁴ *Opinion of Justices* (Mass. 1912) 98 N. E. 338.

¹⁴⁵ *Beach v. Bredstreet* (Conn. 1912) 82 Atl. 1030.

¹⁴⁶ *Kingman v. Brocton* (1891) 153 Mass. 255.

¹⁴⁷ *Hodgdon v. Haverhill* (1907) 193 Mass. 406, 79 N. E. 830.

went from Connecticut, but was for the benefit of those "whose only claim to a gratuity is in service long since past, rendered some other state," is unconstitutional.

Perhaps on the whole the attitude of the state courts in substantially that held in a recent Massachusetts case. The legislature has "the right to appropriate money raised by taxation to pay the widow and heirs of one who died in office" the balance of the salary for his unexpired term, "*if it can fairly be thought the public good will be served by the grant of such unstipulated reward*,"—and of which fact the legislature is the judge; and payment may be made for *civil as well as military service*.¹⁴⁸ This accords with a dictum of Judge Cooley in *People v. Salem*¹⁴⁹ who says: "It is not in the power of the state in my opinion, under the name of bounty, or under any other cover or subterfuge, to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law of which this is the real nature is void, whatever may be the pretense on which it may be enacted. *The right to hold out pecuniary inducements to the faithful performance of public duty in dangerous or responsible positions stands upon a different footing altogether.*" This was said in reference to a tax to aid the construction of a railroad, to be operated by a railroad company. His conclusion was that although the construction of a railroad was a public purpose, the fact that it was to be controlled by a *private* company made it a *private* purpose. As we saw above this view stands alone now, all the federal and state courts holding otherwise,—that a railroad is a public highway, for which aid may be given, though controlled by a private company; all agree however that where the *business is private*, and the *control private* also, then no aid by taxation may be extended; so, too, with the exception of Missouri, it is generally held that a *public charity*, one open to all, may be aided by taxation though the control is *private*.

From the foregoing the following summary of principles may be made:

- (1) Taxation can be for a public purpose only.
- (2) What is a public purpose is primarily for the legislature, but ultimately for the courts, to determine.
- (3) In doing this the courts will be guided by the course of history, custom, legislation, equity, and what can reasonably be deemed for the public welfare of all.

¹⁴⁸ *Beach v. Bradstreet* (Conn. 1912) 82 Atl. 1030.

¹⁴⁹ (1870) 20 Mich. 452, 4 Am. Rep. 400.

(4) Public purposes are not limited to the mere necessities of government, or legally enforceable claims, but embrace considerations of natural equity, gratitude, charity, and other matters which may tend to make the government subserve the general well-being of society and advance the present and prospective happiness and prosperity of the people.

(5) Holding out pecuniary inducements to the faithful performance of public duty in dangerous or responsible positions, if it can be fairly thought the public welfare will be served by the grant of such unstipulated reward,—if there is the least probability of promoting the public welfare, is a public purpose, standing upon a different basis from a bounty to set up in private business,—and to justify a court in declaring a tax for such a purpose void, the absence of all possible public interest in the purposes for which the funds are raised must be so clear as to be immediately perceptible to every mind.

(6) The taxing power is otherwise unlimited, except by express constitutional provisions.

(7) Before a tax law is held to be unconstitutional for other reasons than because it is not for a public purpose, the precise clause in the constitution which it violates, must be pointed out, and the conflict must be clear and free from reasonable doubt; also every possible presumption not clearly inconsistent with the language and subject matter of the constitutional provision is to be made in favor of the validity of the law.

(8) While constitutional provisions cannot be wrested from their original meaning, nor evaded by technical and literal construction, yet so far as the states are concerned powers not clearly withheld are vested in the legislatures, and general constitutional language should be construed not only in the light of conditions existing at the time of adopting the constitution, but also, since they are designed to operate long in the future, with reference to the changed social, economic and political conditions certain to come, and the new problems which they necessarily have produced or will produce.

(9) By history, custom, constitution, legislation, and judicial decision, education and all that pertains thereto, including the qualification, compensation, and regulation of those who engage therein, is a great public purpose, under the entire control of the Government of the States and Nation, to be molded and advanced by State and National legislatures in such way as they shall from time to time determine is for the public welfare.

(10) So too, history custom, equity, the public welfare, and legislation have made a pension system, designed and effective to beget patriotism, foster loyalty, and insure faithful and superior public service by public servants, a great public purpose, for which the taxing power is justly used to pay gratuities, in the sense of a just claim not enforceable as a contract, though not in the sense that the public has received nothing of value, but rather that it has received or will receive much that has not been, or cannot be, in equity, adequately paid for. Such are given not primarily to benefit the individual, but to induce those best qualified to enter into, and devote the best years of their life to the public service.

In the light of these conclusions, the next paper (part II, to appear in a later number of this Review) will discuss in detail the constitutionality of the proposed teachers' retirement salary bill, now pending in the State Legislature of Michigan.

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